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Patricia Liew Yam Ngoon v MME Fashion Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D3-24-293-95
ARIFIN JAKA J
B 25 APRIL 1996

Civil Procedure *— Judgments and orders — Consent order — Indorsement of notice pursuant to Rules of High Court 1980 O 45 r 7(4)(b) — Time for doing act not stated in notice — Notice of motion to determine whether notice to be indorsed on order — Whether court functus officio — Whether notice should be endorsed on order*

C

On 7 August 1995 a consent order ('the said order') was entered in the proceedings between the plaintiff and defendant. The plaintiff's counsel sent a copy of the draft order to the defendant's counsel for approval. The draft order was endorsed with a notice pursuant to O
D 45 r 7(4)(b) of the Rules of the High Court 1980 ('the RHC'). The endorsement was deleted and the draft order was returned by the defendant's counsel to the plaintiff's counsel with the amendment that the endorsed notice be dated. Despite this objection by the defendant's counsel, the plaintiff's counsel went ahead with the perfection of the said order. The defendant filed a notice of motion
E seeking the court's determination on whether the notice pursuant to O 45 r 7(4)(b) of the RHC should be endorsed on the said order. The issues before the court were (i) whether the court was functus officio in the matter; and (ii) whether the notice should be endorsed on the said order.

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Held, ordering that the endorsement be deleted and the said order be redrawn:

(1) In this situation, where there is a dispute between the parties on the endorsement of the said order with the notice, it is essential
G that either party refer the matter in dispute to the judge for his determination pursuant to O 42 r 8(4) of the RHC. The dispute must be settled before the judge before the said order is perfected. As this had not been done by the parties, they were in contravention of O 42 r 8(4) of the RHC and under such circumstances, the said order had not been perfected. The court
H was not functus officio in hearing the application as the court was not asked to alter, vary or set aside an order after it has been drawn up but only to settle the order under O 42 r 8(4)(see pp 130I, 131A–D); *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 and *BP Paks Sdn Bhd v Sheng Hung Industrial Co Sdn Bhd* [1992] 3 CLJ 1573 distinguished.

I

(2) Order 42 r 6(1) of the RHC states that an order which requires a person to do an act must specify the time after service of the order, or some other time, within which the act is to be done. It

is essential that the time within which the act is to be done must be expressly stated in the order as required under O 45 r 5 of the RHC. Consequently, the said order was not enforceable under O 45 r 5 of the RHC and the indorsement of the said order with the notice was improper and should be deleted. The said order should be redrawn and perfected accordingly (see pp 131E, 132C); *Haw Par Bros (Pte) Ltd v Dato Ah Kow* [1973] 2 MLJ 169 followed.

[Bahasa Malaysia summary

Pada 7 Ogos 1995 suatu perintah persetujuan ('perintah tersebut') telah dimasuki di dalam prosiding di antara plaintif dan defendan. Peguam plaintif telah menghantar sesalinan deraf perintah kepada peguam defendan untuk diluluskan. Deraf perintah itu telah diindorskan dengan suatu notis menurut A 5 k 7(4)(b) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Pengindorsan itu telah dipotong dan deraf perintah itu telah dikembalikan oleh peguam defendan kepada peguam plaintif dengan pindaan bahawa notis itu patut diberi tarikh. Meskipun terdapat bantahan ini oleh peguam defendan, peguam plaintif telah meneruskan dengan penyempurnaan perintah tersebut. Pihak defendan telah memfailkan notis usul memohon penentuan mahkamah mengenai sama ada notis menurut A 5 k 7(4)(b) KMT itu patut diindorskan atas perintah tersebut. Isu-isu dihadapan mahkamah adalah (i) sama ada mahkamah adalah *functus officio* dalam perkara ini; dan (ii) sama ada notis itu patut dindorskan atas perintah tersebut.

Diputuskan, memerintahkan bahawa pengindorsan dipotong dan perintah tersebut dibuat semula:

(1) Dalam keadaan ini, di mana terdapat pertikaian di antara pihak-pihak mengenai pengindorsan notis itu di atas perintah tersebut, adalah perlu supaya salah satu daripada pihak-pihak merujuk perkara yang dipertikaikan kepada hakim untuk keputusannya menurut A 42 k 8(4) KMT. Pertikaian itu mesti diselesaikan di hadapan hakim sebelum perintah tersebut disempurnakan. Oleh kerana ini telah tidak dilakukan oleh pihak-pihak, mereka telah melanggar A 42 k 8(4) KMT dan dalam hal keadaan demikian, perintah tersebut telah tidak disempurnakan. Mahkamah bukanlah *functus officio* dalam mendengar permohonan ini kerana mahkamah tidak diminta untuk mengubah, meminda atau mengetepikan suatu perintah selepas ianya dibuat tetapi cuma untuk menentukan perintah tersebut di bawah A 42 k 8(4) (lihat ms 130I, 131A–D); *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 dan *BP Paks Sdn Bhd v Sheng Hung Industrial Co Sdn Bhd* [1992] 3 CLJ 1573 dibeza.

(2) Aturan 42 k 6(1) KMT menyatakan bahawa suatu perintah yang menghendaki seseorang untuk melakukan sesuatu perbuatan mesti menetapkan tempoh masa selepas penyampaian perintah, atau sesuatu masa lain, dalam mana tindakan itu perlu dilakukan.

Adalah perlu bahawa masa dalam mana perbuatan patut dilakukan haruslah dinyatakan dengan jelas di dalam perintah sepertimana yang diperlukan di bawah A 45 k 5 KMT. Oleh sebab itu, perintah tersebut tidak boleh dikuatkuasakan di bawah A 45 k 5 KMT dan pengindorsan perintah tersebut dengan notis adalah tidak teratur dan hendaklah dipotong. Perintah tersebut hendaklah dibuat semula dan disempurnakan sewajarnya (lihat ms 131E, 132C); *Haw Par Bros (Pte) Ltd v Dato Ah Kow* [1973] 2 MLJ 169 diikut.]

[*Editorial Note*: The plaintiff has appealed to the Court of Appeal vide Civil Appeal No W-02-174-96.]

Notes

For cases on consent orders, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2036–2039.

Cases referred to

BP Paks Sdn Bhd v Sheng Hung Industrial Co Sdn Bhd [1992] 3 CLJ 1573
Haw Par Bros (Pte) Ltd v Dato Aw Kow [1973] 2 MLJ 169
Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143

Legislation referred to

Companies Act 1965 s 167
Rules of the High Court 1980 O 42 rr 6, 8(4), 45 rr 2, 5, 7(4)(b)
Companies Act (Cap 185) s 167(5), (6) [Singapore]

Gurmit Kaur Sidhu (*Shearn Delamore & Co*) for the plaintiff/respondent.
K Thavakumar (*Mohamed Ismail & Co*) for the defendant/applicant.

Arifin Jaka J: By this notice of motion (encl 15) the defendant seeks a number of reliefs which to my mind is essentially one which relates to the dominant question as to whether the notice as required under O 45 r 7(4)(b) of the Rules of the High Court 1980 ('RHC') should be endorsed on the court order dated 7 August 1995 ('the said order').

It is not disputed that the said order was a consent order, the relevant part of which is as follows:

ADALAH DIPERINTAHKAN SECARA PERSETUJUAN BAHAWA defendan membenarkan plaintif bersama dengan auditor-auditornya Encik Ler Cheng Chye dan/atau Lum Tuck Cheong dari Ler, Lum & Co atas akujanji bertulis oleh auditor-auditor tersebut bahawa kesemua maklumat yang diperolehi akan diberi tahu kepada plaintif sahaja difailkan di mahkamah ini untuk memeriksa buku-buku rekod-rekod dan semua dokumentasi perakaunan defendan DAN SETERUSNYA BAHAWA tiada perintah bagi kos.

It is also not in issue that as usual the plaintiff's counsel sent a copy of the draft order to the defendant's counsel for approval. The draft order was indorsed with a notice pursuant to O 45 r 7(4)(b) of the RHC and in the form as provided for in Form 87 therein. The notice reads as follows:

> Jika kamu, MME Sdn Bhd yang dinamakan dalam ini, pengarah-pengarah atau pegawai kamu abai mematuhi perintah ini kamu boleh dikenakan proses pelaksanaan bagi maksud memaksa kamu mematuhinya.

The defendant's counsel objected to the indorsement of the notice in the said order. The draft order was returned to the plaintiff's counsel with the amendment that the notice indorsed thereon be dated. Despite the objection, the plaintiff's counsel went ahead with the perfection of the said order.

The issue before this court is whether the notice should be endorsed on the said order and the defendant's counsel was wrong in deleting it from the draft order. Before dealing with the issue, it is appropriate for me to dispose of a preliminary objection raised by the plaintiff's counsel at the beginning of the hearing of this motion. The plaintiff's counsel contended that the said order was true and valid and it was a regular judgment. The court is functus officio in this matter and has no power to hear this application. Learned counsel cited *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 and *BP Paks Sdn Bhd v Sheng Hung Industrial Co Sdn Bhd* [1992] 3 CLJ 1573 to support her contention. It was therefore contended that the defendant should go by way of an appeal. With respect I do not agree with the contention of the learned counsel. These two cases cited deal with the question of setting aside judgments which are regularly obtained and properly drawn up perfected and extracted. In the instant application the question to be decided is not the setting aside of the order but to delete an endorsement which is made on the order as provided for under the rules of the court. The said order remains valid and the court is not asked to alter, vary or set aside an order after it has been drawn up.

On receipt of the amended draft order from the defendant's counsel, the plaintiff's counsel hurriedly wrote a letter to the Timbalan Pendaftar on 8 August 1995 enclosing two copies of the draft order and insisted that the endorsement of the said order with the notice be allowed to stand. The letter states inter alia:

> Kami ingin mencatitkan untuk rekod bahawa klausa 'Pengindorsan di bawah Aturan 45 Kaedah-Kaedah Mahkamah Tinggi 1980' tidak patut dikeluarkan dari deraf penghakiman. Ini merupakan cara pelaksanaan perintah tersebut yang tunggal di bawah Aturan 45. Sekiranya Pengindorsan dikeluarkan Plaintif tidak akan mempunyai apa-apa cara lain untuk memastikan pelaksanaan Perintah tersebut. Oleh itu kami harap pihak tuan akan luluskan deraf Penghakiman tersebut dengan klausa tersebut.

It is clear that the senior assistant registrar was pursuaded by the contention of the plaintiff's counsel as stated in the letter dated 8 August 1995 and allowed the notice to be endorsed on the said order and perfected the order accordingly. The defendant's counsel was not given an opportunity to explain why he objected to the endorsement. In a situation such as this

A it is strictly essential that either party should refer this matter in dispute to the judge for his determination pursuant to O 42 r 8(4) of the RHC. This order reads as follows:

> Every judgment or order shall be settled by the Registrar, but in the case of a judgment or order made by a Judge, any party may require the matter in
B dispute to be referred to the Judge for his determination.

In this instant case it cannot be denied that there is a dispute between the parties on the endorsement of the said order with the notice and this dispute was never referred to the judge for his determination before the order was perfected by the senior assistant registrar. I am of the view that
C before the said order was perfected the dispute must be settled before the judge. This has not been done which is in contravention of O 42 r 8(4) of the RHC. Under these circumstances I am of the view that the said order was not properly perfected. The court is not functus officio in hearing this application as it is not asked to alter, vary or set aside an order after it has been drawn up but only to settle the order under O 42 r 8(4). The
D preliminary objection has no merit and I dismissed it.

This brings me to the dominant issue of whether the endorsement of the notice should be made on the said order. Order 42 r 6(1) states that an order which requires a person to do an act must specify the time after service of the order, or some other time, within which the act is to be done.

E It was contended by the counsel for the defendant that the said order does not specify the time within which the act is to be done and therefore it cannot be enforced under O 45 of the RHC. It is essential that the time within which the act is to be done must be expressly stated in the order as required under O 45 r 5. The learned counsel also referred to *Civil*
F *Procedure* by Jeffrey Pinsler at p 957 where the learned author states: 'For the purpose of enforcement, a person will be liable to committal if he is required by a judgment or order to do an act within a specified time ...'.

In the *Supreme Court Practice* (1985) Vol 1 at p 666 it is stated:

> A judgment or order requiring any act to be done must state the time within
G which the act is to be done before it can be enforced by the methods provided by this rule. Such time may be specified either by the original judgment or order (see O 42 r 2) as extended or abridged under O 3 r 5 or by a supplemental order made under r 6.

The rule referred to therein is O 45 r 5 which is similar to our O 45 r 5 of
H the RHC except that there is no enforcement in our rule by a writ of sequestration against the property of that person. Order 42 r 2 mentioned therein is in pari materia with our O 45 r 2 of the RHC and O 3 r 5 is similar to our O 3 r 5.

In *Haw Par Bros (Pte) Ltd v Dato Aw Kow* [1973] 2 MLJ 169 the
I Court of Appeal in Singapore dealt with an order of court made under s 167(6) of the Companies Act (Cap 185) of the Singapore Act. The court order did not specify a time limit during which the accounting and other records should be kept open for injunction. The court held that the order did not amount to a true injunction, either interim or perpetual, as it did

not specify any time limit within which the accounts and other records of the company were to be open for inspection.

It is to be noted that in the instant case the said order was made under s 167(6) of the Companies Act 1965 ('the Act') which is in pari materia with s 167(5) of the Singapore Act. It does not state the time within which the defendant was to allow the plaintiff (who is a director of the defendant company) and the approved company auditor acting for the plaintiff to examine the records and books of the defendant.

Under the circumstances of this case, on the authorities I rule that the said order is not enforceable under O 45 r 5 and consequently the endorsement of the said order with the notice is improper and should be deleted. In consequence I order that the said order be re-drawn and perfected accordingly.

As this matter should have been referred to me for determination under the RHC without the necessity of filing this motion if counsel for both parties were mindful of doing so, I am of the view that it is appropriate for me to make no order as to costs.

Order that the endorsement be deleted and the said order be redrawn.

Reported by Hanim Kamaruddin